

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-220163 **DATE:** December 9, 1985
MATTER OF: Daniel R. Hinkle

DIGEST:

1. Agency official's admittedly erroneous oral advice to a bidder regarding the amount on which a required 20 percent bid guarantee should be based does not prejudice the bidder when the guarantee furnished is defective in other ways in addition to the insufficient amount.
2. Protester's bid is properly rejected as nonresponsive where an irrevocable letter of credit submitted as a bid guarantee does not identify the solicitation or the work to be performed and does not contain an expiration date. Enforceability of the letter of credit is therefore questionable, and the government would not receive the full and complete protection contemplated by the IFB.

Daniel R. Hinkle protests the rejection of his low bid under invitation for bids (IFB) No. R6-1-85-74, issued July 16, 1985 by the Forest Service, U.S. Department of Agriculture. The IFB covered cafeteria services at the Redmond Air Center, Redmond, Oregon, for a base period from October 1, 1985 through September 30, 1986, plus 4 option years. The Forest Service found a letter of credit submitted by Hinkle as a bid guarantee to be materially defective, and it rejected the bid as nonresponsive.

We deny the protest.

The IFB required each bidder to submit with its bid a bid guarantee in the amount of 20 percent of the "total bid price." The solicitation cautioned, in compliance with the applicable Federal Acquisition Regulation (FAR) provision, that failure to furnish a guarantee in the proper form and amount by the time set for bid opening might be cause for rejection of the bid. See FAR, 48 C.F.R. §§ 28.101-4 and 52.208-1 (1984).

The IFB further provided that for each contract year, the government would guarantee payment for the first 200 days of meal services at \$210 per day; this was in addition to the unit prices to be paid, in accord with the bid schedule, for meals actually served. Hinkle's prices for the base year appeared as follows on the bid schedule:

<u>BASIC REQUIREMENT</u> <u>10/1/85 - 9/30/86</u>	<u>Estimated</u> <u>Quantities</u>	<u>Unit</u> <u>Price</u>	<u>Amount</u>
Breakfast	4,000 meals	\$1.73	\$ 6,920
Lunch	4,500 meals	\$2.48	\$11,160
Dinner	3,600 meals	\$2.73	\$ 9,828
Guarantee	200 days	\$210	\$42,000
TOTAL BID ITEM 1			\$69,908

Hinkle's extended prices for the three meals for 1 year, excluding the guaranteed payment, thus totaled \$27,908. Hinkle states that because he was not certain whether the required 20 percent bid guarantee was to be based on this total, or whether it was to be based on this total plus the \$42,000 guaranteed by the government, he called the procurement office in the Deschutes National Forest on July 26, 1985. Block 10 of the IFB included a telephone number for this office and instructed bidders to call the procurement clerk for information.

According to Hinkle, the procurement office orally advised him not to include the \$42,000 in computing the amount of the bid guarantee. Hinkle states that since 20 percent of \$27,908 is \$5,581.60, he arranged for an irrevocable letter of credit in the amount of \$5,600. At bid opening on August 16, 1985, however, the contracting officer rejected the bid because the letter of credit was less than 20 percent of the "total bid price," including the \$42,000 guaranteed by the government. Hinkle's bank subsequently offered to provide an amended letter of credit in the amount of \$14,000, or slightly more than 20 percent of Hinkle's \$69,908 total; however, the contracting officer refused to accept it, providing the basis for Hinkle's protest.

In its report on the protest, the Forest Service acknowledges that it apparently gave Hinkle incorrect information when he called to determine the basis for the bid guarantee. The agency argues, however, that the solicitation clearly stated that guarantee was to be based on the "total bid price," and that the only reasonable interpretation of this price is that it includes the \$42,000 guaranteed by the government. The agency further argues that Hinkle's bid guarantee was deficient not only as to the amount. It points out that the letter of credit did not reference either IFB No. R6-1-85-74 or the cafeteria services at the Redmond Air Center; did not include a bank identification number unique to the letter of credit; and did not contain an expiration date. The agency contends that the letter of credit therefore does not constitute the firm commitment required by the IFB, because the issuing bank would have the option not to honor a letter of credit that was not tied to a specific bid.

We believe it was reasonable for Hinkle to call the number listed in the solicitation and ask whether his bid bond had to be for an amount that included the payment guaranteed by the government, or merely for the amount over and above that which the government would pay. In this case, there is more than one reasonable interpretation of what constitutes the "total bid price." We also believe it was reasonable for Hinkle to rely on the agency's oral advice not to include the \$42,000 in calculating the required bid guarantee. However, we find that Hinkle was not prejudiced by the erroneous advice, since we agree that the letter of credit submitted by Hinkle lacks the essentials of a firm commitment.

A letter of credit is essentially a third-party beneficiary contract. Upon request of its customer, a financial institution may issue such a letter to a third party, whose drafts or other demands for payment will be honored upon the third party's compliance with the conditions specified in the letter. The effect and purpose of a letter of credit is to substitute the credit of some entity other than the customer for the credit of the customer. See Chemical Technology, Inc., B-192893, Dec. 27, 1978, 78-2 CPD ¶ 439 and cases cited therein; see generally Juanita H. Burns et al., 55 Comp Gen. 587 (1975), 75-2 CPD ¶ 400.

The determinative question in judging the sufficiency of any bid guarantee, including a letter of credit, is whether it could be enforced if the bidder subsequently fails to execute required contract documents and to provide performance and payment bonds. See Truesdale Construction Co., Inc., B-213094, Nov. 18, 1983, 83-2 CPD ¶ 591. A bidder need not comply with the exact requirements relating to a bid guarantee in order for its bid to be considered responsive, so long as the surety--in this case the bank issuing the letter of credit--would be liable notwithstanding any deviations. See J.W. Bateson Co., Inc., B-189848, Dec. 16, 1977, 77-2 CPD ¶ 472.

We find that since the letter of credit submitted by Hinkle did not refer to the IFB by number or indicate that it was for cafeteria services at the Redmond Air Center, the contracting officer could not be sure that it was intended to cover this particular contract or that it had not also been submitted in connection with bids on other contracts. Further, since it did not contain an expiration date for presentation of drafts for payment, it is doubtful whether it could be enforced by the Forest Service. We therefore do not believe that the government would receive the full and complete protection it contemplated in drafting the IFB. See Juanita H. Burns et al., *supra*. Under such circumstances, we do not believe that the letter of credit constitutes the firm commitment required by the IFB.

Hinkle suggests that the agency could have called his bank to ascertain that it intended to be bound by the letter of credit for the subject IFB. This would not have been proper, since a nonresponsive bid cannot be made responsive by actions taken after bid opening. When required, a bid guarantee is a material part of a bid and must, therefore, be furnished with the bid. Baucom Janitorial Services, Inc., B-206353, Apr. 19, 1982, 82-1 CPD ¶ 356. When a bidder supplies a defective bond, the bid itself is rendered defective and must be rejected as nonresponsive. Truesdale Construction, Inc., *supra*. Similarly, the bank's offer after bid opening to provide an amended letter of credit could not be considered. Id.

Finally, although acceptance of Hinkle's bid might result in a monetary savings to the government, we have often observed that maintaining the integrity of the competitive bidding system is more in the government's best interest than the savings to be obtained by acceptance of a nonresponsive bid. A.D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194.

We conclude that the contracting officer properly rejected Hinkle's bid as nonresponsive. The protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel